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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KENNETH H. CRAIN
and WILLIAM K. VANOVER

Appeal 2009-000634
Application 09/812,405¹
Technology Center 2100

Decided: January 12, 2010

Before LEE E. BARRETT, LANCE LEONARD BARRY, and
HOWARD B. BLANKENSHIP, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the final rejection of claims 1-15 and 18-21. Claims 16 and 17 have been canceled. We have jurisdiction pursuant to 35 U.S.C. § 6(b).

We reverse.

¹ Filed March 19, 2001, titled "Methods and Devices for Recording Changes in Visual Stimuli Observed Through Browser-Based Interfaces." The real party in interest is Schlucktronix LLC.

STATEMENT OF THE CASE

The invention

The invention provides methods and devices that address problems encountered when attempting to accurately reconstruct visual stimuli being displayed to a user as they interact with online-content, typically through a browser interface. Abstract. Being able to reconstruct visual stimuli that is being presented to a user enables the study of how users react to that stimuli. Spec. 1, ll. 26-28.

Illustrative claim

Independent claim 1 is reproduced below:

1. A system that enables a reconstructing of user-viewable visual stimuli comprising:

a processing platform for: executing code capable of recording a user-viewable visual stimuli, verifying a change in the visual stimuli without requiring user specified information as an input, and creating a visual event as a result of a browser event that causes a change in the visual stimuli; and

a storage platform for storing at least the visual stimuli, wherein the storage platform is operably coupled to the processing platform;

wherein the processing platform is adapted to reconstruct at least one of:

the visual stimuli; and

the change in the visual stimuli, at a specific time that a user viewed the visual stimuli.

The references

Ezekiel	US 5,625,783	Apr. 29, 1997
Rapaport	US 5,890,152	Mar. 30, 1999

The rejection

Claims 1-15 and 18-21 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Rapaport and Ezekiel. The Examiner finds that the limitations of independent claims 1 and 13 are taught by Rapaport except for "creating a visual event as a result of a browser event that causes a change in the visual stimuli" (emphasis added). The Examiner finds that this limitation is taught by the dynamic user interface menu construction in Ezekiel and concludes that it would have been obvious "to include Ezekiel's teaching with system of Rapaport in order to provide users with a computer system that can automatically and dynamically construct user inter menus 'on the fly'." Final Office Action (FOA) 3. The Examiner finds that independent claim 21 is the same scope as claim 13 and rejects it under the same rationale. FOA 9.

ISSUES

Based on Appellants' contentions, the issues are:

Have Appellants shown that the Examiner erred in finding that the combination of Rapaport and Ezekiel teaches: (1) "executing code capable of recording a user-viewable visual stimuli" as recited in claims 1 and 13; (2) "verifying a change in the visual stimuli without requiring user specified information as an input" as recited in claim 1, "verifying a change in the

visual stimuli" as recited in claim 13, and "verifying a change in the displayed visual stimuli" as recited in claim 21; (3) "creating a visual event as a result of a browser event that causes a change in the visual stimuli," as recited in claims 1 and 13; and (4) "creating a visual event as a result of a browser event that causes the change in the visual stimuli and to the change in the user's eye position with respect to a portion of the visual stimuli" (emphasis added) as recited in claim 13?

Arguments not raised are considered waived. *See In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) ("It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for nonobvious distinctions over the prior art."). Thus, although the Examiner did not address the limitation of "verifying a change in the eye position based on the change in the displayed visual stimuli" in claim 21, because the Examiner relied on the analysis of claim 13 which does not contain this limitation, the limitation has not been argued. This does not affect the outcome.

PRINCIPLES OF LAW

"[T]he test [for obviousness] is what the combined teachings of the references would have suggested to those of ordinary skill in the art." *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). A rejection under 35 U.S.C. § 103(a) is based on the following factual determinations: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) any

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objective indicia of non-obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 399 (2007) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966)). All claim limitations must be taught or suggested.

FINDINGS OF FACT

Rapaport

Rapaport states that it is desirable to provide a way for retrieving and evaluating information on the Internet using user-specific characteristics. Col. 2, ll. 9-12.

Rapaport describes a Personal Feedback browser for obtaining and storing personal profile data into a Personal Profile database. The Personal Feedback browser is used to obtain information from the Internet based on user characteristics and selections such as: (1) interests/identity; (2) attitude/aptitude characteristics; (3) personality characteristics; (4) media compatibility criteria; and (5) media comprehension ability. Col. 5, ll. 36-42. The Personal Profile database contains Profile Object parameters which store information regarding a user's personal characteristics that are used by software modules to evaluate a retrieved media file. Col. 6, ll. 50-53. Profile Objects may include a Distance value, an Activation value, an Alpha value, and a Text Comprehension Parameter. Col. 6, ll. 53-60.

Profile Objects are active or inactive. Each Profile Object has a Distance value representing a difference between the Profile Object and a Self Object representing the user. Col. 6, l. 64 to col. 7, l. 11. Each Profile Object has an Activation value and an Activation Threshold value. The

Distance value and Activation value are adjusted by the user's choices in accessing media files and interaction with media files. Col. 7, ll. 9-10 & 19-21. If a Profile Object's Activation value is greater than the Activation Threshold value, the Profile Object is active. Col. 7, ll. 16-25. That is, greater user interest will increase the Activation value which is used for searching and selecting media files.

The user's rate of progression through the media file may indicate interest in the particular media file. Col. 11, ll. 53-58. The Activation value may be adjusted based on the media progression. Col. 12, ll. 26-39.

One measure of media progression is based on an eye tracking device that measures coordinates of eye gaze to determine which media is being viewed, pupil diameter to indicate changes in interest, and head position to indicate changes in the reader's interest. Col. 12, ll. 43-67.

Ezekiel

Ezekiel describes that known systems require that all possible menu contents must be determined ahead of time and that there is no convenient way to incorporate unanticipated new functionality into an existing set of menus. Col. 2, ll. 48-52.

Ezekiel provides a method and system by which a computer can automatically and dynamically construct user interface menus "on the fly" during execution of a program. Col. 3, ll. 11-14.

ANALYSIS

(1) *"executing code capable of recording a user-viewable visual stimuli" (claims 1 and 13)*

The Examiner finds that the limitation "executing code capable of recording a user-viewable visual stimuli" is taught in Rapaport at column 2, lines 34-40, where "the examiner interprets user-viewable stimuli to be any data viewable by the user." FOA 2.

Appellants argue that the portion of Rapaport cited by the Examiner refers to providing a media file to the display, which does not involve "executing code capable of recording a user-viewable visual stimuli" (emphasis added). Br. 12.

The Examiner states that Rapaport teaches the limitation "because it stores activation value in personal profile database, (see Rapaport column 6, lines 55-60) and activation values are visual stimuli." Ans. 11.

Appellants reply that an activation value is a value that is adjusted by the user's choice in accessing media files and interaction with media files, not a "user-viewable visual stimuli." Reply Br. 6.

We agree with Appellants that the activation value in Rapaport is not "user-viewable visual stimuli," but is a measure of the user's interest in the particular media file. Rapaport permanently stores activation values in Profile Objects indicating a user's interaction in accessing the media files (col. 7, ll. 19-21), not the visual stimuli itself. Of course, Rapaport stores visual stimuli temporarily to display it to the users, but it does not record it for the later claimed purposes of "reconstructing at least one of: the visual

stimuli; and the change in visual stimuli." Appellants have shown that the Examiner erred as to this limitation.

- (2) *"verifying a change in the visual stimuli without requiring user specified information as an input" (claim 1), "verifying a change in the visual stimuli" (claim 13) and "verifying a change in the displayed visual stimuli" (claim 21)*

The Examiner finds that "verifying a change in the visual stimuli" is taught in Rapaport at column 12, lines 33-37, where "the examiner interprets determining whether a scroll bar is depressed as verifying a change in visual stimuli" (FOA 2-3, 6) and finds that the limitation "without requiring user specified information as an input" is taught in Rapaport at column 12, lines 46-68 where the Examiner asserts that "[s]ensing changes in eye pupil diameter is neither an user specified information nor a examination of how the user is looking at the visual stimuli" (FOA 3).

Appellants argue that depressing a scroll bar is a user-specified input because a scroll bar cannot depress itself. Br. 10. It is also argued that determining if the media file segment is printed, saved, or listened (discussed at col. 12, lines 35-37) does not relate to "visual" stimuli. Br. 11.

The Examiner responds that Rapaport identifies the change in profile object activation value "which includes the coordinates of users' eye gaze and users' eye pupil diameter, and by identifying these changes, Rapaport is verifying changes in visual stimuli," referring to column 12, lines 40-60.

Ans. 10.

Appellants notes that the Examiner stated in the Final Office Action that "[s]ensing changes in eye pupil diameter is neither an user specified information nor a examination of how the user is looking at the visual stimuli" (FOA 3) and therefore is taking two different and contradictory positions. Reply Br. 5. It is argued that verifying a change in visual stimuli cannot be accomplished simply by gathering data regarding where a user's eyes are looking and information about the user's eyes, such as pupil dilation, because the change must be verified in some other manner. *Id.* at 4.

We agree with Appellants that determining whether a scroll bar is depressed by a user is contrary to the limitation of verifying "without requiring user specified information as an input" as recited in claim 1. However, claims 13 and 21 do not recite this limitation. Nevertheless, claims 1, 13, and 21 all recite "verifying a change in the visual stimuli" (claim 21 includes the word "display").

The Examiner has not explained how measuring the changes in coordinates of eye gaze or pupil diameter "verify[] a change in the visual stimuli." Rapaport describes that the "changes in coordinates of eye gaze determine which media is being viewed and a rate of media progression." Col. 12, ll. 55-56. We agree with Appellants that measuring a change in the coordinates of eye gaze does not "verify a change in the visual stimuli." A person's eyes may move regardless of whether there is a change in the visual stimuli. The statement in Rapaport that changes in eye gaze "determine which media is being viewed" only indicates that the user is actually looking at a particular medium because the eye gaze is shifting, not that there has

been any change in the visual stimuli. Appellants have shown that the Examiner erred as to the limitation "verifying a change in the visual stimuli," which is present in claims 1, 13, and 21.

(3) *"creating a visual event as a result of a browser event that causes a change in the visual stimuli" (claims 1 and 13)*

The Examiner finds that "creating a visual event related to the change in the visual stimuli" is taught in Rapaport at column 12, lines 37-40, where "the examiner interprets changing the activation value of the profile relating to the media file as creating a visual event relating to the change in visual stimuli." FOA 3. The Examiner finds that Rapaport does not teach "creating a visual event *as a result of a browser event* that causes a change in the visual stimuli" (emphasis added) and relies on Ezekiel. *Id.*

Appellants argue that the Examiner misconstrues the claim limitations because the claim does not recite "related to." Br. 12. It is argued that a change in an activation value of a profile is simply not a "visual event." *Id.*

The Examiner finds that Rapaport creates a visual event "because its software program would highlight sections of a media file in response to the value assigned to the media file based on its associated key words" (Ans. 11), referring to column 6, lines 55-60 and column 13, line 55 to column 14, line 6.

Appellants argue that highlighting sections of a media file "has absolutely nothing to do with 'creating a visual event relating to a change in the visual stimuli.' Instead, it deals with highlighting sections of text that

match keywords after converting a sound file to text." Reply Br. 6. It is argued that "a user enters key words, and they are not a result of visual stimuli, much less changes in visual stimuli." *Id.* at 7.

Part of the problem here is that the Examiner has not interpreted what is meant by a "visual event." The Specification describes a "visual event" in connection with Figure 7: "In the case of a change in the visual stimuli within one or more windows of the browser interface, a visual event 767 is created containing the current time, an assigned event type, and the unique id assigned to the event by the control program." Spec. 24, ll. 7-10. That is, a visual event is described as a record of the change in visual stimuli. The Examiner's last-stated position, that highlighting sections of a media file is "creating a visual event" evidently interprets a "visual event" to be something visual, like highlighting. Without deciding whether such an interpretation of "visual event" is reasonable in view of the Specification, we conclude that such an interpretation does not meet the claim language. The highlighting is not a result of a change in the visual stimuli, but is based on matching of user keywords/key phrases. Appellants have shown that the Examiner erred as to the limitation "creating a visual event as a result of a browser event that causes a change in the visual stimuli," which is present in claims 1 and 13.

- (4) *"creating a visual event as a result of a browser event that causes the change in the visual stimuli and to the change in the user's eye position with respect to a portion of the visual stimuli" (claim 13)*

Appellants argue that the Examiner improperly broke the limitation up into two separate parts and has failed to show that the references disclose creating a visual event based both conditions. Br. 15.

The Examiner states that "visual event" corresponds to the activation value and to the change in rate of progression value in Rapaport. FOA 6-7.

Giving the Examiner the benefit of the doubt, we assume the Examiner may be saying that the activation value corresponds to the "visual event" and that the activation value is responsive to a change in the visual stimuli and the change in the user's eye position, i.e., that the activation value is responsive to two conditions. However, as Appellants have previously pointed out, the activation value is not a "visual event." Thus, we conclude that the Examiner erred as to this limitation.

CONCLUSION

Appellants have shown that the Examiner erred in finding that the combination of Rapaport and Ezekiel teaches: (1) "executing code capable of recording a user-viewable visual stimuli" as recited in claims 1 and 13; (2) "verifying a change in the visual stimuli without requiring user specified information as an input" as recited in claim 1, "verifying a change in the visual stimuli" as recited in claim 13, and "verifying a change in the displayed visual stimuli" as recited in claim 21; (3) "creating a visual event as a result of a browser event that causes a change in the visual stimuli," as

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recited in claims 1 and 13; and (4) "creating a visual event as a result of a browser event that causes the change in the visual stimuli and to the change in the user's eye position with respect to a portion of the visual stimuli" (emphasis added) as recited in claim 13. Accordingly, based on one or more of these missing limitations, the rejection of claims 1-15 and 18-21 under 35 U.S.C. § 103(a) is reversed.

REVERSED

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